

VOLUME 57, NUMBER 2, SPRING 2016

Global Tobacco Control as a Health and Human Rights Imperative

Harold Hongju Koh*

As the World Trade Organization (“WTO”) enters its third decade, it can chronicle a growing list of achievements and challenges.¹ In particular, its dispute settlement mechanism has become a consequential tool of global governance. Early on, the WTO marked an important milestone when the Appellate Body clarified that the WTO Agreement should not be read in “clinical isolation from public international law.”² By so saying, the WTO broke free of the narrower focus that had characterized the General Agreement on Tariffs and Trade (“GATT”), announcing instead that the world’s trade rules and institutions would henceforth operate within the broader framework of evolving international law.

One of the greatest challenges facing the WTO over its next two decades will be how it considers “human-focused” bodies of public international law in its trade deliberations, particularly the international law that governs human rights and public health. The WTO’s most immediate challenge will be how its dispute settlement process treats the set of cases in which nations acting at the behest of the global tobacco industry have challenged a set of

* Sterling Professor of International Law, Yale Law School; Legal Adviser, U.S. Department of State, 2009–13; Assistant Secretary of State for Democracy, Human Rights and Labor, 1998–2001; Counsel for Uruguay in *Phillip Morris Brands Sarl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016), discussed further in notes 50–67 and accompanying text, *infra*; Counsel for the United States in *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Final Award (Jan. 12, 2011), <http://www.state.gov/documents/organization/156820.pdf>. This essay is based on remarks delivered at Harvard Law School on April 4, 2016, at a joint lecture on Tobacco Control as a Public Health and Human Rights Imperative with Dr. Howard Kyongju Koh of the Harvard School of Public Health; at Harvard Law School’s WTO@20 conference, held on April 29, 2016; and at the Sanela Diana Jenkins Human Rights Series at Stanford and UCLA Law Schools in January 2014. I thank my good friends at Harvard Law School—Professors Gerry Neuman, for generously inviting my brother and me to deliver the joint lecture, and Mark Wu, for kindly inviting me to give an earlier version of these remarks at the WTO@20 conference—and Professors Richard Steinberg and Kal Raustiala for hosting me at Stanford and UCLA. I am grateful to Raj Bhala, Clara Brillembourg, Anupam Chander, Bill Dodge, David Grewal, Rebecca Ingber, Amy Kapczynski, and Steven Arrigg Koh for their helpful suggestions; Sergio Puig and Greg Shaffer for their important work on international tobacco litigation; Erin Biel of Yale Law School for outstanding research assistance; and Dr. Howard Kyongju Koh, Matt Myers of the Campaign for Tobacco-Free Kids, and my colleagues in the Uruguay and Grand River tobacco cases for their insight and inspiration.

1. For a fine review, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT’L L. 9 (2016).

2. See Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, 17, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

national regulations designed to protect local populations from the grave health consequences of tobacco addiction.³

This essay argues first that, in deciding trade disputes, WTO panels may consider human rights and public health considerations as legitimate background concerns when conducting their interpretation of conventional and customary international law. Second, under certain circumstances, human rights and public health can constitute both a shield and a sword with respect to national regulation. On the one hand, such human-focused considerations can justify a WTO member state's use of health and human rights concerns as a shield: namely, defending what might otherwise be seen as a WTO violation as lawful exercises of police power authority. On the other hand, a WTO panel can, under certain circumstances, invoke human rights as a sword to help invalidate member state regulation. Third, going forward, the legal battleground over global tobacco control will be an important litmus test for whether WTO dispute settlement bodies take these propositions seriously.⁴

My bottom line is that tobacco control should be world trade law's number one human rights and public health imperative. Of all consumer products, tobacco has proven uniquely dangerous to human health. The massive scientific findings on this issue are indisputable.⁵ In the twentieth century alone, tobacco use killed some 100 million people worldwide: more than both World Wars combined.⁶ Tobacco consumption is the world's number one cause of noncommunicable disease, contributing to some 6 million global deaths annually.⁷ By comparison, since first reported, the widely pub-

3. Cuba, the Dominican Republic, Ukraine, Honduras, and Indonesia all filed WTO tobacco cases against Australia, which were consolidated before a single panel. See Procedural Agreement Between Australia and Ukraine, Honduras, The Dominican Republic, Cuba and Indonesia, *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs. WT/DS434/12, WT/DS435/17, WT/DS441/16, WT/DS458/15, WT/DS467/16 (May 5, 2014), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm [hereinafter *Australia — Plain Packaging*]. These parties complain, *inter alia*, that Australian labeling and packaging requirements violate WTO rules by limiting or prohibiting the use of trademarks and/or geographical indications on tobacco products by requiring standardized packaging. Recently, the Ukraine dropped its WTO claims. See Communication from the Chairperson of the Panel, *Australia — Plain Packaging*, WTO Doc. WT/DS434/16 (June 3, 2015) (indicating that on May 28, 2015, Ukraine requested the panel to suspend its proceedings). For a timeline of the key events in the consolidated WTO tobacco cases, see *Where Is the Plain Packaging Issue in the WTO?*, WORLD TRADE ORG. (Feb. 25, 2015), https://www.wto.org/english/news_e/news14_e/timelinetobacco_e.pdf. See generally Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 383–86, 408–12 (2016) (describing the WTO cases).

4. While this essay, and the remarks on which they were based, focus particularly on the trade law setting in which the WTO tobacco cases cited in note 3 arise, some of the analysis equally applies to the investor-state dispute settlement setting, where I first faced these questions. See *supra* note * and cases cited therein; see also text accompanying *infra* note 68 (discussing a tobacco carve-out for investor-state dispute settlement in the Trans-Pacific Partnership).

5. See Howard Kyongju Koh, *It Shouldn't Take Another 50 Years: Accelerating Momentum to End the Tobacco Epidemic*, 20 CLINICAL CANCER RESEARCH 1719 (2014). See generally MICHAEL ERIKSEN ET AL., *THE TOBACCO ATLAS* (4th ed. 2012).

6. MICHAEL ERIKSEN ET AL., *supra* note 5, at 15.

7. See WORLD HEALTH ORG. ("WHO"), *GLOBAL STATUS REPORT ON NONCOMMUNICABLE DISEASES* xiii (2014), <http://www.who.int/nmh/publications/ncd-status-report-2014/en/>.

licized Ebola virus has killed fewer than 12,000 people worldwide.⁸ Although aggressive health regulation has helped markedly to reduce tobacco consumption in the United States over the half-century, the tobacco industry has simply shifted its marketing to the developing world, where tobacco consumption has more than doubled in recent years.⁹ Left unchecked, in the twenty-first century, *1 billion people* are expected to die from cigarette smoking.¹⁰ Such mind-boggling statistics insist that international lawyers take a harder look at whether and when the concept of free and fair trade can be invoked to strike down carefully considered national regulation of a lethal imported consumer product.

I. HEALTH AND HUMAN RIGHTS IN WTO ADJUDICATION

It has long been settled that, in deciding trade disputes, WTO panels may consider human rights and public health concerns as legitimate background for interpretation. After all, trade liberalization is fundamentally a means, not an end. The preamble to the Marrakesh Agreement, which established the framework for the WTO system, declares the system's objectives not as free trade per se, but rather, fulfillment of basic human values, including the improvement of living standards for all people and sustainable development.¹¹ Such improvement cannot reasonably be achieved unless adequate respect is given to legitimate governmental concerns regarding public health and human rights.

Far from being a novel view, trade commentators and officials have widely accepted this position dating back to before the WTO's founding.¹² Perhaps

8. See WHO, EBOLA SITUATION REPORT, at 2 (Mar. 30, 2016), http://apps.who.int/iris/bitstream/10665/204714/1/ebolasitrep_30mar2016_eng.pdf.

9. See *infra* notes 69–70; see also Michael C. Fiore, *Tobacco Control in the Obama Era — Substantial Progress, Remaining Challenges*, NEW ENGL. J. MED. (Aug. 17, 2016), <http://www.nejm.org/doi/full/10.1056/NEJMp1607850#t=article> (The decline in smoking rates among U.S. adults “has accelerated substantially during the 7 years of the Barack Obama presidency.”).

10. Lindsay Abrams, *Tobacco on Pace to Kill 1 Billion People This Century*, ATLANTIC (Aug. 21, 2012), <http://www.theatlantic.com/health/archive/2012/08/tobacco-on-pace-to-kill-1-billion-people-this-century/261385/> (citing the Global Adult Tobacco Survey).

11. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement] (“[r]ecognizing that . . . trade and economic endeavours should be conducted with a view to raising standards of living . . . and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development”); see also Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 12, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *United States — Shrimp/Turtle*] (noting, in construing Article XX that a “purpose [that] is fundamental to the application of Article XX cannot be ignored [in light of the wording of] the preamble to the Marrakesh Agreement”).

12. See, e.g., Makau Mutua & Robert Howse, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, in HUMAN RIGHTS IN DEVELOPMENT YEARBOOK 1999/2000: THE MILLENNIUM EDITION 51, 62 (Hugo Stokke & Anne Tostensen eds., 2001) (“[T]he actual text of the GATT reflects the recognition of supervening non-trade public values which were meant to prevail in the event of conflict with the free trade rules in the GATT.”); Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in HUMAN RIGHTS AND INTERNATIONAL TRADE

then-WTO Director General Pascal Lamy put it most directly in 2010 when he suggested, "One could almost claim that *trade is human rights in practice!* . . . It is [at least in part the] responsibility [of the WTO and UN human rights bodies] to coordinate our actions in a meaningful and efficient manner to ensure that trade does not impair human rights, but rather strengthens them."¹³

In the twenty-first century, one of those human rights should be a right to be free from preventable communicable and noncommunicable disease. Under international law, the International Covenant on Economic, Social and Cultural Rights ("ICESCR") obligates all States Parties to recognize the right to "enjoyment of the highest attainable standard of physical and mental health," as well as to take steps necessary to prevent, treat, and control disease.¹⁴ General Comment 14 from the ICESCR Treaty Committee ("CESCR") states: "Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity," and such rights may be enforceable in law.¹⁵ In the tobacco setting, this concept should be understood to encompass the notion that human beings have an enforceable right to *avoid preventable noncommunicable disease caused by tobacco addiction and promoted by underregulated private production, marketing, and consumption.*

29, 43 (Thomas Cottier et al. eds., 2005) ("[S]ince the rights of legitimate governments derive from the rights of their citizens[,] international trade law should be construed, in conformity with the universal recognition of inalienable human rights . . ."); Ernst-Ulrich Petersmann, *The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?*, 7 J. INT'L ECON. L. 605, 606 (2004) (hereinafter Petersmann, *The "Human Rights Approach"*) ("The end of the cold war has led to universal recognition in the Vienna Declaration of the UN World Conference on Human Rights (1993) that 'all human rights are universal, indivisible, and interdependent and interrelated' . . . and that there is a need for 'international organizations . . . to create favorable conditions . . . to ensure the full and effective enjoyment of human rights.'"); see also Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 753-814 (2002); Joost Pauwelyn, *Human Rights in WTO Dispute Settlement*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 205, 205-31 [hereinafter Pauwelyn, *Human Rights in WTO Dispute Settlement*] (Thomas Cottier et al. eds., 2005) (examining, through a positive law approach, the different ways in which the WTO can or should take account of human rights in trade dispute settlement).

13. Pascal Lamy, Speech at the Colloquium on Human Rights in the Global Economy (Jan. 13, 2010) (emphasis added); see also JAMES BACCHUS, *TRADE AND FREEDOM* 470-71 (2004) (former Chair of WTO Dispute Settlement Body) ("Trade is a means to an end. The end is freedom. Much that can be done for the end of freedom through the means of trade simply will not be done unless politics yields to law, and unless diplomacy yields to jurisprudence. . . ."); Petersmann, *The "Human Rights Approach,"* *supra* note 12, at 622 ("In the several hundred dispute settlement proceedings under GATT 1947 and the WTO during more than half a century, no conflict between GATT and WTO rules and human rights has so far been identified.").

14. International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (now ratified by 164 countries and signed by six others, including the United States).

15. Comm. on Econ., Soc. and Cultural Rights, CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (art. 12), ¶ 1, U.N. Doc. EC.12/2000/4 (Aug. 11, 2000) [hereinafter CESCR General Comment 14]; see also Amartya Sen, *Why and How Is Health a Human Right?*, 372 LANCET 2010 (2008); Alicia Ely Yamin, *The Right to Health Under International Law and Its Relevance to the United States*, 95 AM. J. PUB. HEALTH 1156 (2005).

Whether that individual human right can be adequately protected by responsible governments turns critically upon whether dispute settlement bodies acknowledge that those nations themselves have a right under international law to protect public health through reasonable government regulation. Because tobacco use is the world's leading preventable cause of death, the ICESCR and customary international law do not just empower—they oblige—national governments to regulate to protect those rights effectively. According to the CESCR's General Comment 14, protecting that right entails affirmative and aggressive government action. This includes adoption by national regulators of "legislative, administrative, budgetary, judicial, promotional and other measures" that "prevent third parties from interfering with . . . the right to health."¹⁶ "Violations of the obligation to protect" may arise from "the failure of a State party to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties" including "the failure to discourage production, marketing and consumption of tobacco"¹⁷

In the last quarter-century, the world community has reached a striking global consensus regarding appropriate national regulatory tools for tobacco control. In 1979, a World Health Organization ("WHO") report called for the creation of an international regulatory mechanism for tobacco control.¹⁸ Two decades later, the WHO began work on such a mechanism: the Framework Convention on Tobacco Control ("FCTC"),¹⁹ which has now entered into force for 180 States Parties.²⁰ Article 3 makes clear that the goal of this landmark convention is "to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke" by authorizing regulatory tools designed to help countries reduce supply and demand for tobacco products.²¹ The painstakingly negotiated convention imposes a comprehensive set of obligations to implement and manage tobacco control measures, which encompass protection from exposure to tobacco smoke; regulation of the contents of tobacco products and tobacco product disclosures; prevention of false or misleading packaging of tobacco products; and restrictions on

16. CESCR General Comment 14, *supra* note 15, ¶ 33. Cf. *Minister of Health v. Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC) (S. Afr.) (requiring the government of South Africa to provide its residents with Nevirapine to prevent mother-to-child transmission of HIV).

17. CESCR General Comment 14, *supra* note 15, ¶ 51.

18. See WHO EXPERT COMM. ON SMOKING CONTROL, CONTROLLING THE SMOKING EPIDEMIC 39–40 (1979), http://apps.who.int/iris/bitstream/10665/41351/1/WHO_TRS_636.pdf; see also WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, HISTORY OF THE WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL 2 (2009), http://apps.who.int/iris/bitstream/10665/44244/1/9789241563925_eng.pdf.

19. WHO Framework Convention on Tobacco Control, *adopted* May 21, 2003, 2302 U.N.T.S. 166 (entered into force Feb. 27, 2005) [hereinafter FCTC].

20. *Parties to the WHO Framework Convention on Tobacco Control*, WHO (Feb. 12, 2015), http://www.who.int/fctc/signatories_parties/en/.

21. See FCTC, *supra* note 19, art. 3.

tobacco advertising, promotion, and sponsorship.²² Special care was taken in the drafting of the FCTC to ensure its compliance with WTO requirements.²³

In a number of international dispute settlement fora, the tobacco industry has challenged FCTC implementation as a violation of rights granted to states (or their nationals) under international economic treaties, of corporate rights to engage in commercial speech and to protect intellectual property, and of consumers' human right to consume tobacco free from government paternalism.²⁴ But as noted above, human rights now stand on both sides of the trade equation. Thus, in an interpretive dispute, the question would be how to weigh such competing public health and human rights considerations against one another, as well as against legitimate, countervailing free and fair trade concerns.

II. HEALTH AND HUMAN RIGHTS AS A SHIELD AND A SWORD

That leads to my second proposition: under certain circumstances, human rights and public health concerns can be both a shield and a sword—a valid defense against a claimed WTO violation and a valid way to challenge national action that undermines these concerns.

Human rights and public health considerations can act as a shield: they can justify a WTO member state's exercise of the police power to engage in what might otherwise be seen as a WTO violation. From the outset, the

22. See *id.* arts. 8–11, 13.

23. A joint study of the WTO and WHO Secretariats took pains to state that none of the provisions of the FCTC are inherently inconsistent with the WTO, and many of the restrictions may well be deemed “necessary” for the protection of public health under WTO rules. See WHO & WTO, *WTO AGREEMENTS & PUBLIC HEALTH* ¶¶ 16, 138, 304 (2002), https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf. Former Director-General of the WHO Pascal Lamy similarly explained in 2011 that WTO rules and FCTC implementation are not incompatible. See *WTO Rules and the Implementation of the WHO FCTC Are Not Incompatible*, WHO, http://www.who.int/fctc/wto_fctc/en/ (last visited May 30, 2016); see also Background Paper from the FCTC/COP4(18), Workshop on Trade-related Issues Relevant to Implementation of the WHO FCTC (Mar. 2012), http://www.who.int/fctc/1-1-1-Summary_Workshop_Content_EN.pdf (detailing possible provisions of WTO law that tobacco companies have raised or could raise against sovereign nations and identifying possible defenses).

24. See, e.g., *Philip Morris Asia Ltd. (Hong Kong) v. Australia*, UNCITRAL, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility (Dec. 17, 2015) (brought under the Hong Kong-Australia Bilateral Investment Treaty but dismissed for lack of jurisdiction); *Philip Morris Nor. AS v. Ministry of Health and Care Serv.*, Case E-16/10 [EFTA Ct. Rep. 330] (Sept. 12, 2011) (concluding that the ban on tobacco advertising, which included a prohibition on visual displays in retail locations, affected tobacco products manufactured in Norway to the same extent that it affected imported tobacco products and, therefore, there was no discrimination); *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Final Award (Jan. 12, 2011) (dismissing the NAFTA chapter 11 arbitration case for lack of jurisdiction over claims concerning compensation for tobacco regulation measures); *Phillip Morris Brands Sarl v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Request for Arbitration, ¶ 43 (Feb. 19, 2010); see also Myron Leving, *Tobacco Industry Uses Trade Pacts to Try to Snuff Out Anti-smoking Laws*, NBC NEWS (Nov. 29, 2012), http://openchannel.nbcnews.com/_news/2012/11/29/15519194_-tobacco-industry-uses-trade-pacts-to-try-to-snuff-out-anti-smoking-laws?lite (stating that the tobacco industry was paying the legal fees of Ukraine, Honduras, and the Dominican Republic in order for these countries to bring WTO cases against Australia challenging its plain-packaging laws).

GATT's drafters included Article XX, which provided that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures," *inter alia*, "necessary to protect public morals," "necessary to protect human, animal or plant life or health," or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."²⁵ On their face, measures to protect "human . . . life or health" against disease, such as those taken under the Framework Convention on Tobacco Control, would seem to fall within this language. Other WTO Agreements include similar language, such as the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS") and the Agreement on Technical Barriers to Trade ("TBT").²⁶

As originally conceived, Article XX was designed to be a fundamental building block of the world trading system. Yet in two of the most important GATT opinions before the WTO's founding—*Thailand — Cigarettes*²⁷ and *United States — Tuna/Dolphin I*²⁸—the GATT panels construed Article XX so narrowly as to limit its meaningful application. Those cases developed the constricted notion that regulatory measures could only be justified under Article XX if a less trade-restrictive alternative to achieve the policy objectives in question were not reasonably available.²⁹ But since it is rare

25. General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

26. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement] ("[r]eaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health"); Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement] ("[r]ecognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, or the environment"). Significantly, the Doha Declaration regarding trade-related aspects of intellectual property rights ("TRIPS") and public health also states: "We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health . . ." See World Trade Organization, Declaration on the TRIPS Agreement and Public Health of 14 November 2001 ("Doha Declaration"), ¶ 4, WTO Doc. WT/MIN(01)/Dec/2, 41 I.L.M. 755 (2002), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. But because GATT Article XX does not apply to TRIPS, which also lacks a general exceptions clause, it remains unclear whether a WTO panel would invalidate an apparently direct violation of intellectual property rights protected by the TRIPS that also contributed directly and substantially to a grievous injury to public health.

27. Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 72–75, GATT Doc. DS10/R - 37S/200 (adopted Nov. 7, 1990) [hereinafter *Thailand — Cigarettes*] (finding that Thailand's import restrictions on cigarettes and other tobacco products were inconsistent with the GATT and not justified as "necessary" for public health under GATT Article XX(b)).

28. Panel Report, *United States — Restrictions on Imports of Tuna*, GATT Doc. DS21/R (Sept. 3, 1991) (panel report ultimately not adopted, but providing notable commentary for later disputes, particularly with respect to extraterritorial environmental regulations and measures based on processes or production methods).

29. In the pre-WTO case of *Thailand — Cigarettes*, for example, Thailand's regulations were found to be inconsistent with trade obligations because less trade-restrictive measures could be identified. But even then, the panel suggested that the less trade-restrictive approach permitted regulation of local

that one could not imagine some less trade-restrictive policy tool that could hypothetically achieve a given objective, this interpretation sharply narrowed the Article XX exception.

In recent years, the WTO Appellate Body offered a more expansive interpretive approach in the *United States — Shrimp/Turtle* case, when it construed the term "exhaustible natural resources" in an environmental trade dispute.³⁰ Rather than woodenly seeking a less restrictive alternative, the Appellate Body interpreted Article XX to include living "endangered species" within "exhaustible natural resources," a phrase it construed in light of a modern understanding of international environmental law as it had evolved since the GATT was first negotiated.³¹ By so saying, the Appellate Body suggested that when examining WTO claims, other human-focused bodies of public international law can offer a justification that precludes a panel from finding that WTO law has been breached.³²

Jurisdictionally, WTO panels may only decide claims raised under agreements covered by the WTO.³³ But Article 3.2 of the Dispute Settlement Understanding ("DSU") directs panels to interpret WTO-covered agreements "in accordance with customary rules of interpretation of public international law."³⁴ In turn, Article 31(3) of the Vienna Convention on the Law of Treaties (which states generally applicable rules of treaty interpretation)

advertising. See *Thailand — Cigarettes*, *supra* note 27, ¶¶ 75, 78–81 (emphasizing the nondiscrimination and necessity tests concerning health measures according to GATT Article XX(b)).

30. See *United States — Shrimp/Turtle*, *supra* note 11.

31. *Id.* ¶ 130 ("From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary.' It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.") (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21, 1971) ("[I]nterpretation cannot remain unaffected by the subsequent development of law Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.")).

32. The panel acknowledged that the U.S. measures to protect sea turtles were provisionally justified under GATT Article XX(g), but nevertheless found that the measures had been applied in a manner that constituted arbitrary and unjustifiable discrimination among WTO members, contrary to the requirements of the Article XX chapeau. See *id.* ¶¶ 185–86. However, the panel also noted:

In reaching these conclusions, we wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

Id. ¶ 185.

33. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1.1, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (applying only to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this [Dispute Settlement Understanding]").

34. *Id.* art. 3.2.

instructs that when interpreting any treaty, the interpreter must account not just for the treaty at hand but also for “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,” as well as “[a]ny relevant rules of international law applicable in the relations between the parties.”³⁵

All of this suggests that a WTO panel may interpret the relevant WTO rules in the context of relevant human rights or public health treaties. A party to the panel proceedings could thus raise a public health or human rights defense against a WTO claim in cases in which a public health or human rights treaty required or authorized the state action, in which case the WTO obligation should be read flexibly in the context of that other body of international law. In a case in which following an explicit WTO obligation would put the member state in violation of its legal obligations under health and human rights law (and if the complainant state were also bound by the same health or human rights norm), the WTO Dispute Settlement Body would need to decide which of the two norms prevailed under interpretive rules governing conflicts of international laws.³⁶ To be sure, the defending nation would not automatically win by invoking the health and human rights “trump card.” For example, the defending nation could not interpose the health and human rights concern as a pretext to engage in violation of well-accepted free trade rules forbidding arbitrary and discriminatory treatment.³⁷ But if the health or human rights norm were found to be

35. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]; see also Robert Howse, *The Canadian Generic Medicines Panel: A Dangerous Precedent in Dangerous Times*, 3 J. WORLD INTELL. PROP. 493, 496, 501–02 (2000) (identifying how VCLT article 31(3) should have been applied in a past WTO case concerning obligations under the TRIPS, one of the WTO covered agreements). In addition, Joost Pauwelyn has pointed out: “the obligation in Article 11 of the DSU for panels to make an ‘objective assessment of . . . the applicability of . . . relevant covered agreements’ may require a panel to refer to and apply other rules of international law; these other rules may show that the relevant WTO rules do *not* apply and have therefore not been violated; in contrast, failure to look at these other rules would preclude an ‘objective assessment of . . . the applicability of . . . the relevant covered agreements.’” Pauwelyn, *Human Rights in WTO Dispute Settlement*, *supra* note 12, at 216 (quoting DSU, *supra* note 33, art. 11). A recent Appellate Body decision provides further commentary on the role of the VCLT in WTO dispute settlement. See Appellate Body Report, *Peru — Additional Duty on Imports of Certain Agricultural Products*, ¶ 6.4, WTO Doc. WT/DS457/AB/R (adopted July 31, 2015) (finding that “Peru’s arguments regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31(3)(a) and (c) of the Vienna Convention [were] within the scope of the appeal,” but finding that the Panel did not commit an error by not interpreting the WTO provisions at issue under Article 31(3) of the Vienna Convention, since the challenged provisions of the Peru-Guatemala free trade agreement and International Law Commission were not “relevant” to the interpretation within the meaning of VCLT Article 31(3)(c)).

36. See generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003) (explaining the relationship and hierarchy between WTO law and other branches of international law).

37. For example, in the *Clove Cigarettes* case, a U.S. restriction was found to be discriminatory because the United States had banned clove cigarettes, but not all other flavored cigarettes (e.g., menthol), which appeared to raise the same health concerns. Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 234–36, WTO Doc. WT/DS406/AB/R (adopted Apr. 24, 2012); see also Puig, *supra* note 3, at 399–400 (discussing the *Clove Cigarettes* case).

legitimate and a conflict unavoidable, the panel could accept the human-focused legal justification and decline to find a WTO violation.³⁸

Perhaps the most controversial use of a health and human rights argument would arise if a state used that argument as a sword. A party could invoke human rights "offensively" to authorize executive action: for example, human rights clauses in economic agreements concluded with the European Union could authorize a party to take "appropriate measures" to suspend the trade preferences afforded to a state party that failed to comply with human rights principles.³⁹ A complainant could also invoke human rights offensively in WTO adjudication, asking a panel to invalidate another state's law whose legality was being defended on grounds of compliance with WTO law. Assuming that the panel had jurisdiction to decide the claims of any WTO violations, the panel should also be able to apply other bodies of international law, including human rights and public health law, in assessing the legality of the national regulations. While it seems unlikely that a WTO panel would entertain, for example, a direct claim of violation under the International Covenant on Civil and Political Rights,⁴⁰ the terms of the TBT Agreement permit challenges to a state's deviation from an "international standard"—defined as "standards that are developed by international bodies."⁴¹ If the meaning and application of the human rights rule were clear—for example, a *jus cogens* rule—a WTO panel could apply it directly. But if the meaning of the human rights rule were ambiguous, advice from the authoritative interpretive body regarding the human rights treaty could be sought, not just to help the WTO panel to reach the most correct decision, but also to maintain uniformity in the interpretation of the human rights treaty.⁴²

Thus, if a tobacco company or a proxy state⁴³ were to invoke a human rights claim to invalidate a national regulation implementing the FCTC, the WTO panel could hear human rights arguments both in support of and

38. Cf. Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2011) (holding that the measure was both provisionally justified under GATT Article XX(b) and under Article XX chapeau by reversing the Panel's finding that asbestos and non-asbestos products were "like" products for the purposes of GATT Art. III:4 national treatment analysis).

39. See Pauwelyn, *Human Rights in WTO Dispute Settlement*, *supra* note 12, at 206.

40. *Id.*

41. Annex 1.2 of the TBT Agreement further defines "standard" as a "[d]ocument approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory." TBT Agreement, *supra* note 26, Annex 1.2. See also, e.g., Panel Report, *European Communities — Trade Description of Sardines*, ¶¶ 7.63–7.70, WTO Doc. WT/DS231/R (adopted Oct. 23, 2002) (finding that Codex Stan 94, an international standard concerning the classification of sardines, was a relevant international standard to use in examining the European Communities' sardine classification system).

42. See Pauwelyn, *Human Rights in WTO Dispute Settlement*, *supra* note 12, at 231.

43. See Puig, *supra* note 3, at 384 ("Whether by persuading WTO members like Ukraine with no direct interest in the Australian tobacco market to bring a complaint, by paying the legal fees of countries like the Dominican Republic to argue for deregulation in the sector, or by relying on their web of subsidiaries around the world to stimulate litigation before the World Bank's arbitration tribunals, Brit-

against the measure. But if the national government were closely following both FCTC and universally accepted human rights “standards,” it should have a successful defense on the merits against the challenge.⁴⁴ After all, with respect to tobacco control, national governments complying with the FCTC would not be acting arbitrarily, but rather, asserting and protecting the human rights of their own inhabitants to be free of preventable disease. In deciding such cases, the WTO Dispute Settlement Body should recognize that in exercising its police power in such cases, the national government is acting as *parens patriae* in the classical sense: a protector of the individual rights of local residents to achieve the highest attainable level of public health. A nation acting to control the epidemic of tobacco-related illnesses would be doing so under the aegis of a widely subscribed international agreement. To the extent that international adjudication recognizes that distinctive governmental role, it would have the effect of upholding public health, human rights, and national sovereignty while also advancing a carefully considered and painstakingly negotiated global regulatory agenda.

Given all of this, an obvious question going forward is whether national efforts to implement the FCTC faithfully should simply be exempted altogether from invalidation in WTO dispute resolution. Some have proposed that, as in the case of conflict diamonds, a supermajority of WTO members should grant a formal waiver to WTO liability for national regulations that comply with the FCTC.⁴⁵ But this solution could require the consent of those few WTO members who have signed, but not yet ratified, the FCTC.⁴⁶ Alternatively, member states of the FCTC could agree to another

ish American Tobacco (“BAT”) and Phillip Morris International (“PMI”) are using international law to limit antismoking regulations.”); *see also* Leving, *supra* note 24.

44. Indeed, one of the agreements most relevant to tobacco plain packaging claims, the TBT Agreement, addresses the incorporation of standards in just this fashion. *See* Jamie Strawbridge, *U.S. Implementation of Adverse WTO Rulings: A Closer Look at the Tuna-Dolphin, COOL, and Clove Cigarettes Cases*, ASIL (Oct. 30, 2013), <https://www.asil.org/insights/volume/17/issue/23/us-implementation-adverse-wto-rulings-closer-look-tuna-dolphin-cool-and>. To the extent that a technical regulation “in accordance with” a relevant international standard is presumed not to create “an unnecessary obstacle to international trade,” pursuant to TBT Agreement Article 2.5, compliance with a valid human rights standard would arguably create a safe harbor “shield” against a claim of WTO violation. *See* Pauwelyn, *Human Rights in WTO Dispute Settlement*, *supra* note 12, at 223–24. *Cf.* Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, ¶ 590, WTO Doc. WT/DS320/AB/R (explaining that a panel should defer to a member state’s risk assessment under the SPS Agreement, so long as “[t]he risk assessment is supported by coherent reasoning and respectable scientific evidence,” a standard the FCTC tobacco regulations easily meet).

45. *See* GATT, *supra* note 25, art. XXV:5 (“In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; [p]rovided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.”); Werner Meng, *Conflicting Rules in the WHO FCTC and Their Impact*, in *HUMAN RIGHTS AND INTERNATIONAL TRADE* 334, 334–339 (Thomas Cottier et al. eds., 2005) (considering the possibility of a WTO waiver for tobacco regulations, parallel to the Kimberley Waiver for restrictions on conflict diamonds). The Marakesh Agreement, *supra* note 11, art. IX:3, provides that a WTO Member may waive a WTO obligation only if approved by three-fourths of members.

46. Currently, only eleven WTO Members have not ratified the FCTC. Four have not yet signed or ratified the FCTC: the Dominican Republic, Indonesia, Liechtenstein, and Malawi. *See Status of the WHO*

protocol to that treaty explicitly stating its primacy or exempting regulations implemented under its aegis from dispute resolution under prior treaties concluded among the member states that have ratified that protocol, including the WTO.⁴⁷ In the end, it is perhaps most likely that the issue would be resolved through simple treaty interpretation. The final text of the FCTC tellingly omitted two provisions that would have confirmed the priority of WTO law over the Convention.⁴⁸ Accordingly, in an interpretive dispute between two states parties to both the WTO and the FCTC, the panel could reasonably conclude that the Tobacco Convention constituted the treaty that is both later-in-time and more specific in content, and hence should prevail under the rules of treaty interpretation governing *lex specialis* between the two parties.⁴⁹

As this Article went to press, an ICSID tribunal issued a sweeping award rejecting tobacco industry claims in an investor-state arbitration brought by Philip Morris and sub-entities against Uruguay under the Switzerland-Uruguay Bilateral Investment Treaty ("BIT").⁵⁰ The complainants challenged

Framework Convention on Tobacco Control (FCTC), FCTC (Mar. 18, 2015), http://www.fctc.org/images/stories/docs/ratifications/latest_ratifications.pdf. Seven others have signed but not yet ratified the framework convention: Argentina, Cuba, Haiti, Morocco, Mozambique, Switzerland, and the United States. See *WHO Framework Convention on Tobacco Control*, UNITED NATIONS TREATY COLLECTION (last visited July 7, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-4&chapter=9&lang=en. Significantly, other WTO Members that did not sign the FCTC prior to the June 29, 2004, signature deadline can still become parties to the FCTC through accession.

47. The FCTC seeks to operate by consensus on any proposed amendment or protocol to the Convention. However, when a consensus cannot be reached, an amendment or protocol can be "adopted by a three-quarters majority vote of the Parties present and voting at the session." Therefore, if all 180 Parties to the FCTC were present and voting at a given session, 135 of them would need to vote in favor of the amendment or protocol, if a consensus cannot be reached. See FCTC, *supra* note 19, arts. 28(3), 33(2). It should be noted that the Punta del Este Declaration of 2010, issued by the Conference of FCTC parties soon after Phillip Morris first initiated its case against Uruguay, pointedly recalls that the general exception stated in Article XX(b) of the GATT gives WTO Members significant flexibility to design and implement measures to protect public health, provided that the measures are adopted and implemented in good faith and do not arbitrarily discriminate or restrict international trade. See Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Punta del Este Declaration on the Implementation of the WHO Framework Convention on Tobacco Control*, FCTC/COP4(5) (Nov. 19, 2010), [http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4\(5\)-en.pdf](http://apps.who.int/gb/fctc/PDF/cop4/FCTC_COP4(5)-en.pdf).

48. See Meng, *supra* note 45, at 335; see also Joost Pauwelyn, *WTO Compassion or Superiority Complex?: What to Make of the WTO Waiver for "Conflict Diamonds,"* 24 MICH. J. INT'L L. 1177, 1201-02 (2003).

49. See VCLT, *supra* note 35, art. 30(3) ("When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."); see also Meng, *supra* note 45, at 335; Pauwelyn, *supra* note 12, at 208, 217-18.

50. The complainants were two Swiss companies, Philip Morris Brands SARL and Philip Morris Products S.A., and their Uruguayan subsidiary Abal Hermanos S.A. Piero Bernardini, the Chair, and James Crawford, now Judge on the International Court of Justice, formed the panel majority and Gary Born issued a partial dissent. See Philip Morris Brands SARL (Switz.), Philip Morris Products S.A. (Switz.), & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶¶ 1, 2, 18, 590 (July 8, 2016) [hereinafter Philip Morris v. Uruguay Award], <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>; see also Philip Morris Brands SARL (Switz.), Philip Morris Products S.A. (Switz.), & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Mr. Gary Born, ¶ 1 (July 8, 2016), [hereinafter Philip Morris v. Uruguay Partial Dissent], <http://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>.

two aspects of Uruguay's tobacco control regulations adopted under the leadership of Uruguay's president, an oncologist, consistent with the FCTC: an "80 percent requirement," requiring that tobacco packages dedicate up to eighty percent of display areas to graphic and textual health warnings, and a Single Presentation Requirement, which limited each tobacco brand to one packaging variant, to avoid misleading consumers into believing that some variants were "healthier" than others.⁵¹ The arbitration award rejected each of Philip Morris' core claims, reaffirming many of the arguments outlined above.⁵²

Joined on key points by the partial dissent, the tribunal majority applied an interpretive approach with potentially broad precedential value for future international tobacco litigation. First, in rejecting Philip Morris' claims and upholding the legality of Uruguay's regulations, the tribunal accepted the relevance of arguments made by public health authorities⁵³ and espoused by human rights tribunals.⁵⁴ Second, the tribunal ruled that the BIT should be interpreted in light of well-established customary international law recognizing the protection of public health as an "essential manifestation of the State's police power," so that economically affected investors might not claim compensation for expropriation in cases in which they claimed damages flowing from bona fide governmental public health measures.⁵⁵ Third, all three arbitrators recognized the need for deference—and in the case of the majority, a "margin of appreciation" similar to that frequently invoked by the European Court of Human Rights—to national authorities making public health regulatory choices.⁵⁶ Indeed, the tribunal's deferential review

51. See Philip Morris v. Uruguay Award, ¶¶ 9-11; see also Larry Rohter, *In Uruguay, the President Also Reads Mammograms*, N.Y. TIMES, Aug. 31, 2006, at A3.

52. See Philip Morris v. Uruguay Award, ¶ 590.

53. The tribunal noted with approval third-party briefs filed by the World Health Organization and the Pan-American Health Organization, arguing that "the Challenged Measures were not 'arbitrary and unnecessary' but rather were potentially 'effective means to protecting public health.'" *Id.* ¶ 306; see also *id.* ¶¶ 38-39, 42-43, 141, 361, 391, 393, 407.

54. See *id.* ¶ 295. In particular, Dissenter Born cited a range of human rights instruments confirming that "access to a judicial forum is the most basic guarantee of justice," and suggesting that Uruguay should have provided some forum to challenge the TCA ruling. See Philip Morris v. Uruguay Partial Dissent, ¶¶ 44-72.

55. See Philip Morris v. Uruguay Award, ¶¶ 290-91; see generally Kate Mitchell, *Philip Morris v. Uruguay: An Affirmation of 'Police Powers' and 'Regulatory Power in the Public Interest' in International Investment Law*, EJIL: Talk! (July 28, 2016), <http://www.ejiltalk.org/philip-morris-v-uruguay-an-affirmation-of-police-powers-and-regulatory-power-in-the-public-interest-in-international-investment-law/>.

56. See Philip Morris v. Uruguay Award, ¶¶ 388, 391-96, 399. The majority resoundingly rejected the complainants' claim that the notion of "margin of appreciation" does not apply in BIT arbitration, declaring "[t]he responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health." See *id.* ¶ 399. The Tribunal also found that "the present case concerns a legislative policy decision taken against the background of a strong scientific consensus as to the lethal effects of tobacco. Substantial deference is due in that regard to national authorities' decisions as to the measures which should be taken to address an acknowledged and major public health problem." *Id.* ¶ 418. The partial dissent declined to apply the margin of appreciation but nevertheless found that the terms of the BIT, customary international law, and arbitral decisions "mandate substantial deference to

extended not just to actions of the national political branches, but also to decisions by the national judiciary. Over a dissent, the tribunal majority rejected Philip Morris' claim that national court decisions upholding the legality of the challenged tobacco regulations constituted a denial of justice under international law.⁵⁷

Fourth, the tribunal agreed that Uruguay had not just the power, but also the duty to protect public health flowing both from domestic and international law, including multilateral health conventions to which Uruguay is a party, like the FCTC. Indeed, the tribunal specified a test: regulatory measures are legitimate exercises of the police power if they are "taken *bona fide* for the purpose of protecting the public welfare, [and are] non-discriminatory and proportionate."⁵⁸ Regulations that met that standard constituted neither unlawful expropriation nor violations of the legal duty of fair and equitable treatment.

Because only Uruguay was party to the FCTC, the arbitrators did not address specific legal questions regarding the relationship between the BIT and the tobacco treaty. But the majority's analysis contained important precedents regarding how national authorities may exercise their regulatory power in tobacco cases. The award suggested that countries "with limited technical and economic resources" bore no duty to "perform additional studies or to gather further evidence in support of the Challenged Measures" before regulating to implement the FCTC obligations.⁵⁹ Nor did a regulating state need to prove definitively that its regulatory measure had succeeded in reducing smoking, so long as it showed that the challenged measure, when adopted, was a "reasonable" attempt to address a genuine public health concern.⁶⁰ Given the difficulty of isolating the causal impact of any individual regulatory measure on tobacco consumption, the tribunal found it sufficient not only that the incidence of smoking in Uruguay had recently declined, but also "that these were public health measures which were directed to this end and were capable of contributing to its achievement."⁶¹ Thus, a national government could adopt a novel regulation not yet seen in any other jurisdiction, so long as it had some rational basis and was not discriminatory.

Underscoring the special health concerns raised by tobacco, with respect to expropriation, the tribunal rejected complainants' suggestion that the to-

Uruguay's regulatory and legislative judgments, and forbid any second-guessing of such judgments." Philip Morris v. Uruguay Partial Dissent, ¶¶ 87, 138-39.

57. The majority found that the Uruguayan court decisions upholding the challenged measures involved "procedural improprieties" and "a failure of form" but were not sufficiently "serious" or "egregious" to violate the denial-of-justice provision of the BIT. See Philip Morris v. Uruguay Award, ¶¶ 552-81.

58. See *id.* ¶ 305.

59. See *id.* ¶¶ 393, 396.

60. See *id.* ¶ 409.

61. See *id.* ¶ 306.

bacco regulations disrupted their legitimate expectations at the time of investment: “[o]n the contrary, in light of widely accepted articulations of international concern for the harmful effect of tobacco, the expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products.”⁶² With regard to Philip Morris’ claimed property rights in trademark, the tribunal found tobacco to be one of those products “whose presentation to the market needs to be stringently controlled without being prohibited entirely.”⁶³ Canvassing both domestic and international trademark law, the majority found nothing in any of these legal sources that “supports the conclusion that a trademark amounts to an absolute, inalienable right to use that is somehow protected or guaranteed against any regulation that might limit or restrict its use.”⁶⁴ Thus, while the tobacco companies’ trademark rights arguably entitled them to exclude third parties from using those marks, those rights were still subject to the state’s overriding “regulatory power” over the complainants’ own use of such trademarks.⁶⁵

The Uruguay decision will stand as an unequivocal landmark rebuke of the tobacco industry’s trade arguments. Philip Morris has now twice failed—once on jurisdiction, and now on the merits—to defeat in investor-state arbitration national laws restricting tobacco packaging to promote public health.⁶⁶ Perhaps most striking, the award not only resoundingly rejected the tobacco complainants’ arguments on the merits, but also ordered those complainants to pay \$7 million of Uruguay’s costs.⁶⁷ The unusual order reflects both the majority’s view of the weakness of Uruguay’s substantive case and its willingness to deter Philip Morris and other tobacco companies from chilling further regulatory efforts by filing similar baseless arbitrations against other sovereign regulators. For the longer term, the award confirms the three points I have argued above: human rights and public health arguments are relevant in international trade law cases; these arguments can legitimately shield bona fide regulatory efforts from international law attack; and the legal interpretations of investment tribunals must show their awareness of and sensitivity to the unique danger of tobacco.

62. *See id.* ¶ 430.

63. *See id.* ¶ 270.

64. *See id.* ¶ 268. The tribunal reviewed not only Uruguay’s trademark law, but also other international intellectual property instruments to which Uruguay is a party, such as the WTO TRIPS agreement, the Paris Convention, and the MERCOSUR Protocol. *See id.* ¶¶ 172–73, 260–71.

65. *See id.* ¶ 271.

66. In December 2015, an arbitration panel formed under the Hong Kong-Australia BIT rejected, on jurisdictional grounds, Philip Morris’s challenge to a sweeping Australian tobacco packaging law. *See Philip Morris Asia Ltd. (Hong Kong) v. Australia, UNCITRAL, PCA Case No. 2012–12, Award on Jurisdiction and Admissibility*, pt. VII (Dec. 17, 2015).

67. *See Philip Morris v. Uruguay Award*, ¶ 588.

III. TOBACCO CONTROL AS A GLOBAL BATTLEGROUND AND A LITMUS TEST OF WTO LEGITIMACY

Freer trade has undeniably helped to spur the global tobacco epidemic. As two commentators have recently noted, “[t]obacco’s global success is partly the result of free trade agreements that mandate[d] the removal of import taxes and other commercial restrictions of most goods, including tobacco products.”⁶⁸ Fortunately, because of expanded scientific awareness and dramatically increased health warnings in the United States during the half century since the U.S. Surgeon General’s landmark report,⁶⁹ tobacco consumption in the Northern Hemisphere has sharply declined. But to keep its profit shares up, the global tobacco industry has shifted course and increasingly sought to export its products to the developing world, with all the accompanying risks of addiction, sickness, and death. More than three-quarters of the world’s smokers now live in the developing world, with tobacco consumption there more than doubling in the last three decades of the twentieth century.⁷⁰

When national regulators in these developing countries have sought to invoke provisions of the FCTC to warn their local consumers of the undeniable dangers of these imported products, the industry has challenged those national regulations as violations of international trade and investment laws.⁷¹ Developing nations have considered tobacco control legislation, but

68. See Sergio Puig & Gregory Shaffer, *A Breakthrough with the TPP: The Tobacco Carve-out*, 16 YALE J. HEALTH POL’Y, L. & ETHICS (forthcoming 2016) (manuscript at 1), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2772277 (“Both Republican and Democratic administrations have supported the tobacco industry in trade deals, coupled with over a hundred years of domestic subsidies for tobacco growers and tobacco exports that were only ended (at least for now) in 2014.”).

69. See U.S. DEP’T OF HEALTH AND HUMAN SERVS., SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964), <https://profiles.nlm.nih.gov/NN/B/B/M/Q/>; U.S. DEP’T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 846 (2014) (indicating that in the last half-century, adult smoking rates in the United States have fallen from 42.7% in 1965 to 18.1% in 2012); see also Ahmed Jamal et al., *Current Cigarette Smoking Among Adults—United States, 2005–2014*, at 1233 (Ctrs. for Disease Control and Prevention, Morbidity and Mortality Wkly. Rep. Vol. 64, No. 44, 2015), <http://www.cdc.gov/mmwr/pdf/wk/mm6444.pdf> (placing the adult smoking rate in 2014 at 16.8% and demonstrating a further reduction in the adult smoking rate); Fiore, *supra* note 9.

70. See FOOD & AGRIC. ORG. OF THE UNITED NATIONS, PROJECTIONS OF TOBACCO PRODUCTION, CONSUMPTION AND TRADE TO THE YEAR 2010, at 7, 9, 12 (2003), <http://www.fao.org/3/a-y4956e.pdf> (noting that much of the increase has occurred in China, as well as Africa, where smoking rates had traditionally been low); *Tobacco*, WHO (June 2016), <http://www.who.int/mediacentre/factsheets/fs339/en/>.

71. See Sabrina Tavernise, *Tobacco Industry Tactics Limit Poorer Nations’ Smoking Laws*, N.Y. TIMES, Dec. 13, 2013, at A1. Two provisions of the FCTC deserve particular mention: article 11, which calls for national regulation of packaging and labeling of tobacco products, and article 13, which calls for national limitations upon tobacco advertising, promotion, and sponsorship. See FCTC, *supra* note 19, arts. 11, 13. Australia and Uruguay have taken the lead in enacting laws implementing these treaty provisions. See Tavernise, *supra*. In these cases, the tobacco industry has tried to seize the human rights argument, arguing that such laws infringe their rights to commercial speech, advertising, and intellectual property. See *Philip Morris Asia Ltd. (Hong Kong) v. Australia*, UNCITRAL, PCA Case No. 2012–12, Notice of

the tobacco companies have bombarded them with threats of international litigation, chilling their regulatory efforts. And now, the global tobacco industry has engaged in a massive forum-shopping exercise in numerous litigation and arbitration fora to challenge tobacco control measures worldwide.⁷² Their increasingly visible global litigation campaign⁷³ now rages not just in national courts and the WTO Dispute Settlement Body, but also in arbitration under Free Trade Agreements (“FTAs”)⁷⁴ and BITS.⁷⁵ Where the industry is jurisdictionally barred from suing directly—for example, in WTO cases requiring state complainants—it has enlisted a strange list of governmental bedfellows.⁷⁶ Whether directly or through governmental surrogates, tobacco companies are now litigating internationally to challenge such tobacco control measures as plain packaging requirements; brand registration and presentation requisites; marketing and advertising restrictions; health risk labeling laws; price, import, and export controls; and import and export taxes.⁷⁷ In an unusually candid speech, WHO Director-General Dr. Margaret Chan warned that such tobacco company litigation measures were “deliberately designed to [instill] fear” in countries

Claim, ¶¶ 10(a), 31, 33 (June 22, 2012); Phillip Morris Brands Sarl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, ¶ 43 (Feb. 19, 2010). But in defense of their regulations, these countries have responded that the legal requirements are nondiscriminatory, necessary measures designed to protect human health and to give effect to the FCTC; are not more trade-restrictive than necessary; and do not interfere with effective protection of tobacco-related trademarks. See Phillip Morris Brands Sarl v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Uruguay’s Memorial on Jurisdiction, ¶¶ 102-105, 116, 122, 132 (Sept. 24, 2011); Philip Morris Asia Ltd. (Hong Kong) v. Australia, UNCITRAL, PCA Case No. 2012-12, Australia’s Response to the Notice of Arbitration, ¶¶ 38-39, 41, 46, 53 (Dec. 21, 2011).

72. Philip Morris alone has helped generate one-third of the thirty-nine international litigation cases. See Puig, *supra* note 3, at 393 n.51.

73. For a hilarious, devastating, but ultimately chilling, video exposé of how the industry has supported and financed this global litigation campaign, see *Last Week Tonight with John Oliver: Tobacco* (HBO), YOUTUBE (Feb. 15, 2015), <https://www.youtube.com/watch?v=6UsHHOCH4q8>. See also Ryan Parker, *John Oliver Targets Cigarettes on ‘Last Week Tonight’; Philip Morris Reacts*, L.A. TIMES (Feb. 16, 2015), <http://www.latimes.com/entertainment/tv/showtracker/la-et-st-philip-morris-john-oliver-20150216-story.html>.

74. See, e.g., Grand River Enterprises Six Nations, Ltd. v. United States of America, UNCITRAL, Final Award (Jan. 12, 2011) (dismissing the NAFTA chapter 11 arbitration case for lack of jurisdiction over claims concerning compensation for tobacco regulation measures).

75. See, e.g., Philip Morris Asia Ltd. (Hong Kong) v. Australia, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, ¶¶ 5, 589 (Dec. 17, 2015) (brought under the Hong Kong-Australia BIT but ultimately dismissed for lack of jurisdiction).

76. As Professor Puig notes, Cuba paradoxically challenged Australia’s tobacco regulation as a violation of trademark rights, even though the Cuban government had sought to abolish intellectual property only half a century earlier. See Puig, *supra* note 3, at 383-84. Health campaigners have also been baffled by the now-abandoned WTO suit brought against Australia by Ukraine, which has little to no bilateral trade with Australia and is a party to the FCTC. See Tom Miles, *Ukraine Drops WTO Action Against Australian Tobacco-packaging Laws*, REUTERS (June 3, 2015), <http://www.reuters.com/article/wto-tobacco-idUSL5N0YP3S420150603>.

77. See Leving, *supra* note 24; Puig, *supra* note 3, at 396; see also cases cited in note 24, *supra*. For an illuminating analysis of how tobacco taxes can reduce consumption and promote public health, see Jason Furman, Chairman, Council of Econ. Advisers, Address at World Bank Conference: Six Lessons from the U.S. Experience with Tobacco Taxes (May 24, 2016), https://www.whitehouse.gov/sites/default/files/page/files/20160524_cea_tobacco_tax_speech.pdf.

trying to reduce smoking.⁷⁸ “The wolf is no longer in sheep’s clothing,” she warned, “and its teeth are bared.”⁷⁹

Having helped to create this problem, trade law and institutions can now also become a part of the solution. The WTO can begin by recognizing that a health and human rights crisis of this magnitude should not be treated as business as usual. Both the nature and the scale of the problem are unique. To quote the World Health Organization, tobacco is “the only legally available product that kills up to one half of its regular users when consumed as recommended by its manufacturer.”⁸⁰ Freer trade seeks, *inter alia*, to reduce prices, raise consumption, and improve public welfare. Yet expanded tobacco trade has the opposite effect on welfare. By reducing tariffs, trade agreements increase tobacco consumption, with a devastating effect on public health. Rather than creating a positive sum game for both nations, more trade reduces the welfare of the importing nation. As tobacco consumption expands, so too does the inevitable addiction, disease, and death, with attendant declines in consumer productivity and public health, and accompanying increases in health care costs.⁸¹ In that light, industry attacks designed to undercut national preventive efforts—particularly those taken under FCTC auspices—should be seen for what they are: a fundamental assault, in the guise of protecting free trade, on the very public health and human rights values that the WTO is supposed to protect.

To put things in perspective: suppose a developing nation uncovered a *communicable* disease that, each year, contributed to thousands of deaths and illnesses. Suppose further that the same disease caused 6 million global deaths annually, in the last century killed an estimated 100 million people, and if present trends continued, would kill about 1 billion people in the twenty-first century. Let us suppose further that the primary vector of this horrible disease was an ultra-hazardous foreign consumer product, scientifically demonstrated to kill up to one-half of its users when used as intended by its manufacturers.

Under such circumstances, is there any real doubt that the regulating nation could use the full scope of its police powers to combat this deadly disease through every vector that it might be transmitted, or that in combating this health threat, the nation’s regulations would be entitled to a wide margin of appreciation? Is there any real dispute that, as part of that regulatory effort, the regulating state could require consumer advertising to carry urgent messages warning people of the dangers, and discouraging and

78. Dr. Margaret Chan, Director-General of the WHO, Keynote Address at the 15th World Conference on Tobacco or Health: The Changed Face of the Tobacco Industry (Mar. 20, 2012), http://www.who.int/dg/speeches/2012/tobacco_20120320/en/.

79. *Id.*

80. *Tobacco Free Initiative (TFI)*, WHO, http://www.who.int/tobacco/industry/product_regulation/background/en/ (last visited May 29, 2016).

81. See Puig, *supra* note 3, at 410.

“debiasing” them⁸²—at the point of consumption—from ingesting the causes of the communicable disease? Would any court deny the regulating state broad discretion to bar private merchants, foreign or domestic, from disguising the agents that transmit this deadly disease with bright and attractive packaging that might mislead vulnerable consumers—especially children—to unwittingly addict, sicken, and ultimately kill themselves by consuming the lethal product? And would it really violate world trade and investment laws if national regulators combated the companies’ deceptive marketing tactics by proactively telling the truth about tobacco consumption to the vulnerable—particularly the poor, children, and women—whom the industry especially targets?

Although all concede that tobacco is a lethal product that addicts, sickens, and kills when used as intended, manufacturers keep marketing that product aggressively by glamorizing and normalizing its use, while minimizing its health risks. For decades, multinational tobacco companies pursued their regulatory challenges in domestic courts and suffered a string of well-publicized defeats.⁸³ Yet having failed to make their case in national litigation, multinational tobacco companies have now gone global in their litigation efforts, shopping for sympathetic global fora in which they may repackage their claims as violations of global trade and investment law. To forestall such abuse of the system of international dispute settlement, the recently concluded Trans-Pacific Partnership (“TPP”) has adopted an historic “tobacco carve-out,” which permits TPP members to block corpora-

82. For an insightful analysis of the value of “government debiasing” through tobacco warnings, see Christine Jolls, *Product Warnings, Debiasing, and Free Speech: The Case of Tobacco Regulation*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 53, 53–78 (2013).

83. See, e.g., *JT International SA v. Commonwealth of Australia* [2012] HCA 43 (Austl.); *British American Tobacco Australasia Ltd. v. Commonwealth of Australia* [2012] HCA 43 (Austl.) (upholding Australia’s plain packaging law). In the United States alone, the extensive litigation concerning the Tobacco Massive Settlement Agreement (“MSA”) placed restrictions on particular advertising methods and required that tobacco companies pay states for the funding of tobacco prevention programs. To date, no U.S. court has held that the MSA or any of its related measures violate U.S. law. See *KT&G Corp. v. Att’y Gen. of Oklahoma*, 535 F.3d 1114 (10th Cir. 2008) (affirming decisions of Kansas and Oklahoma courts, which dismissed claims alleging that the Kansas and Oklahoma allocable share amendments violate the Sherman Act and the U.S. Constitution); *Tritent Int’l Corp. v. Kentucky*, 467 F.3d 547 (6th Cir. 2006) (affirming dismissal of claims alleging that Kentucky escrow statute and complementary legislation were preempted by the Sherman Act); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir. 2005) (affirming denial of preliminary injunction against enforcement of New York escrow statute and complementary legislation); *Star Scientific Inc. v. Beales*, 278 F.3d 339 (4th Cir. 2002) (affirming dismissal of claims alleging that the MSA violated the Compact Clause, and that the Virginia escrow statute violated the Due Process, Equal Protection, and Commerce Clauses); *Grand River Enterprises Six Nations, Ltd. v. Beebe*, 418 F. Supp. 2d 1082 (W.D. Ark. 2006) (holding that Arkansas allocable share amendment did not violate the Sherman Act, the First Amendment, the Due Process Clause, the Equal Protection Clause, the Commerce Clause, or the Supremacy Clause); *Omaha Tribe of Nebraska v. Miller*, 311 F. Supp. 2d 816 (S.D. Iowa 2004) (dismissing Indian Commerce Clause and federal law preemption challenges to Iowa escrow statute by cigarette manufacturer owned by Indian tribe); *Sanders v. Lockyer*, 365 F. Supp. 2d 1093 (N.D. Cal. 2005), *aff’d sub nom. Sanders v. Brown*, 504 F.3d 903 (9th Cir. 2007) (affirming dismissal of antitrust claims regarding the MSA).

tions from using the Investor-State Dispute Settlement ("ISDS") mechanism to win compensation from injury attributed to tobacco control measures.⁸⁴

Going forward, the battle over global tobacco control seems destined to provide a litmus test for the very legitimacy of the WTO dispute settlement process. The question will be whether responsible national governments have a right and duty to regulate to protect their residents' public health without being subjected to aggressive, meritless arbitration under economic treaties adopted for other purposes. To the contrary, those regulations are part and parcel of a global movement legally mandating government protection of public health through tobacco regulation. The national laws being challenged in global litigation are not, as the tobacco industry would portray them, aberrational trade restrictions or isolated intrusions upon private investments. Rather, they are essential regulatory measures that seek—as an exercise of transnational legal process—to internalize globally blessed regulatory solutions as part of a vital, considered effort to protect public health and human rights.⁸⁵ For trade and investment panels to read their governing laws to invalidate such carefully crafted national public health regulations would undermine their own legitimacy and thrust them inappropriately into the world of global health management.

A regulating state's international trade and investment obligations must be construed in light of the broader legal framework of public health and human rights against which their litigation arises.⁸⁶ Of course, trade and investment laws are critically important, but they are not the only relevant bodies of international law that govern human behavior. Nor were these bodies of law ever intended to undermine thoughtful global efforts to protect public health and human rights. Indeed, the WTO Agreements explicitly contemplate this by recognizing public health exceptions in the GATT, the General Agreement on Trade in Services ("GATS"), the SPS, and the TBT.⁸⁷ WTO panels should not construe their governing laws so blindly as to disrupt this worldwide public health initiative. Nations have binding legal obligations to protect the lives and health of their citizens against

84. See generally Puig & Shaffer, *supra* note 68.

85. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (describing transnational legal process as a reiterative process of interaction, interpretation, and internalization).

86. Cf. *Chemtura Corp. v. Canada*, UNCITRAL, Award, ¶ 137 (Aug. 2, 2010) (taking notice of Canada's broader international treaty obligations to protect public health, and finding that the "broader factual context is relevant in assessing" the reasonableness and lawfulness of Canada's regulation that banned sales of an agricultural pesticide).

87. See SPS Agreement, *supra* note 26; GATT, *supra* note 25, art. XX(b); General Agreement on Trade in Services art. XVI, Apr. 15, 1994, Marrakesh Agreement, Annex 1B, 1869 U.N.T.S. 183 [hereinafter GATS]; see also TBT Agreement, *supra* note 26, art. 2.2 ("For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives [include] . . . protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration [include] available scientific and technical information, related processing technology or intended end-uses of products.").

hazards to human health, including the harmful effects of tobacco consumption. When tobacco companies trade or invest in those countries, they do so with full notice that the deadly products they market will be subject to these strict legal mandates.

CONCLUSION

Going forward, the international lawfulness of global tobacco controls will almost surely emerge as a litmus test of the WTO's legitimacy. Although written in the context of investment arbitration, the Uruguay decision is a critical first step. As that ruling recognized, arbitration panels may undoubtedly consider human rights and public health concerns as legitimate background for interpretation and, depending on the circumstances, may treat human rights and public health as both a shield and a sword with respect to national regulation. Thus, over its next two decades, the WTO dispute settlement bodies will be tested by how sensitively they include consideration of the "human-focused" bodies of public international law in their trade deliberations, particularly law governing human rights and public health.

Even those who fear that such cases will divert trade panels from their original mission should recognize the compelling case for "tobacco exceptionalism" in world trade law. International law and institutions cannot sensibly treat tobacco as just another traded product. When Joseph Kony, leader of the Lord's Resistance Army, seizes more than 100,000 child soldiers, forces them to kill other children, and then enslaves more children to take their place, international law has no difficulty condemning those acts as "war crimes."⁸⁸ But when a billion-dollar global industry knowingly addicts a vastly larger number of children—causing 6 million deaths annually and then addicts more children to take their place—its defenders seek to immunize those acts under trade and investment law as protected "free trade." Of course, international law cannot redress all wrongs. But how can it maintain its credibility if it does not treat these tragedies in proportion?

88. See Case Information Sheet, International Criminal Court, Situation in Uganda: The Prosecutor v. Joseph Kony and Vincent Otii (Sept. 10, 2015), <https://www.icc-cpi.int/uganda/kony/Documents/Kony-EtAlEng.pdf>.

